nevertheless, be of some assistance in determining the validity of similar and not infrequent efforts by municipal corporations to lower street railway fares.

In the case in question, the company asked for an injunction forbidding the enforcement of such ordinances. The request for equitable relief was based on the embarrassing consequences which would attend an effort in good faith by the company to act on its belief that the ordinances were invalid. Continuous demands by persons who wished to travel at reduced rates would doubtless be followed by their continuous expulsion. Numerous breaches of the peace would result. Suits to enforce the alleged rights of the public would be numerous. Innumerable penalties provided by the ordinances would be incurred. The financial standing of the company would be impaired and a new loan fail—to the company's irreparable loss. The decision of the Supreme Court to grant equitable relief in this case is hardly a fair subject for criticism, since it rests largely on the fact that no objection has been made by the defendants at any stage of the proceedings to this form of relief, provided the plaintiff be entitled to any; and the force of the precedent is expressly limited to exactly similar cases.

The power of the Legislature of Michigan to authorize the municipal corporation to contract as to rates of fare in such a way as to bind future common councils during a specified period seems clear. *Walla Walla* v. *Walla Walla Water Co.* (1898), 172 U. S. 1, 9; *Freeport Water Co.* v. *Freeport*, (1901), 180 U. S. 587. The power of the legislature itself to regulate fares is not in dispute. *Munn* v. *Ill.* (1876), 94 U. S. 155; *Buffalo, etc., Co.* v. *Buffalo, etc., R. Co.*, (1888), 111 N. Y. 132. To exempt a carrier from this control, the terms of the exemption must be unmistakable, *C., B. & Q. R. Co.* v. *Iowa* (1876) 94 U. S. 132; and a municipal corporation has no power to make a contract with a street railway which will prevent the legislature from regulating rates of fare. *Indianapolis* v. *Navin* (1898), 151 Ind. 139. The question is, therefore, reduced to this: Where the company has built under a statute authorizing construction "under such regulations and upon such terms and conditions as the [municipal] authorities may from time to time prescribe," provided the permission of the municipality has been obtained and an agreement made as to rates, is such an agreement a contract which subsequent municipal ordinances cannot impair? This question the court answers in the affirmative. A fair construction of the language of the statute seems to support the decision. The above quotation from the statute appears to refer to those necessary regulations of street railway traffic in connection with the health and comfort of passengers, the necessity for which cannot be foreseen. It is hardly likely that the legislature intended to place within the power of every municipal council the complete control of the earnings of the company and the basis of its existence.

DUTY OF CARRIER TO PROTECT PASSENGER FROM ILL-TREATMENT BY ITS SERVANTS.—The recent case of *McLeod* v. *N. Y., C., & St. L. Ry. Co.* (1902) 72 App. Div. 116, serves to show, if it cannot correct, an error into which the Court of Appeals of New York seems to have

fallen, with regard to the liability of a carrier of passengers for torts inflicted by its servants.

There are two radically different points of view from which this question may be considered. If the liability of the carrier for its agents' injuries to passengers is to rest upon the ordinary doctrine of master and servant, then the carrier is liable only for such wrongs as are done in the course of the servant's employment. All wilful and malicious acts of the servant naturally are not within such course; and for them the carrier would not have to pay. The other and more advanced view is that the carrier is liable absolutely for all injuries inflicted on a passenger by any servant, upon the idea that the carrier is under an absolute duty to the passenger to carry him to his journey's end in safety. In England, the old theory is still adhered to. See *Seymour* v. *Greenwood* (1861) 7 H. & N. 355; *Lowe* v. *G. N. Ry.* (1893) 62 L. J. Q. B. 524. Consequently, a wilful false arrest caused by a ticket-seller, *Poulton* v. *Ry. Co.* (1867) L. R. 2 Q. B. 534, or the wilful assault of a guard, *Ry. Co.* v. *Broom* (1851) 6 Ex. 314, are not actionable. And in *Poulton* v. *Ry. Co. supra*, BLACKBURN, J., distinguishes *Goff* v. *G. N. Ry. Co.* (1861) 3 E. & E. 672, on the point that there the railway was authorized by statute to arrest in such a case as there presented, so the servant, in arresting, acted "within the scope." In this country, for a number of years, the tendency has been to base the carrier's liability on the broader ground above named. And this is forced upon our attention by the cases holding a carrier liable for the conductor kissing a passenger, *Craker* v. *R. R.* (1875) 36 Wis. 657; for the conductor insulting a passenger, *Goddard* v. *R. R. Co.* (1869) 57 Me. 202; for the conductor wilfully assaulting a passenger, *R. R. Co.* v. *Flexman* (1882) 103 Ill. 546; *Bryant* v. *Rich* (1870) 106 Mass. 180. The same principle is laid down in *Steamboat Co.* v. *Brockett* (1886) 121 U. S. 637; *R. R. Co.* v. *Jopes* (1891) 142 U. S. 18. In the latter case the defendant was not liable because the conductor, in shooting the passenger, acted in self-defense. In *Peavey* v. *Ga. R. R. Co.* (1888) 81 Ga. 485, the company was held not liable where the plaintiff, by repeated insults, goaded the conductor into an assault; but the contrary is held in *Daniell* v. *Ry. Co.* (1895) 117 N. C. 592. It is obvious that in not one of the above cases, by any stretch of the imagination, could the servant be considered as acting within the course of his employment, and so, in most of those decisions we find the carrier's liability, in this respect stated to be absolute, and to rest on no rule of *respondeat superior*.

In *Weed* v. *Panama R. R.* (1858) 17 N. Y. 362, the Court announced its adherence to the American rule (as we may venture to call it) by holding the defendant liable for the wilful delay of a train by its conductor. But in *Isaacs* v. *R. R. Co.* (1871) 47 N. Y. 122, a wilful assault of the conductor was held not actionable, because it was not an act within the course of that servant's employment. In *Stewart* v. *R. R. Co.* (1882) 90 N. Y. 588, however, the *Isaacs* Case is overruled by a direct decision that for the wilful assault of a street-car driver upon a passenger, the company is responsible; and the broad doctrine is therein laid down, in such terms as seemingly to bind the court in future cases. But in *Hamel* v. *Ferry Co.* (1889) 6 N. Y. Supp. 102: aff. in 125 N. Y. 707, it was properly held that

the servant's motives and purpose were immaterial, but, inconsistently, the court adds, provided he was acting within the scope of his employment. Real discord, however, came with *Dwinelle* v. *R. R.* (1890) 120 N. Y. 117, where, a judgment of nonsuit, in an action based on a wilful assault, was reversed, for that it should go to the jury on whether the gate-keeper was acting within the scope of his employment. The way being paved, it was easy, in *Mulligan* v. *R. R.* (1892) 129 N. Y. 506, to hold that the arrest of plaintiff by a ticket-seller, who suspected him of being a party wanted by the police, was not within the scope of his employment, as his motives were to benefit the State. The dissent of EARL and FINCH, JJ., apparently, had some effect, for in *Palmeri* v. *Man. El. R. R.* (1892) 133 N. Y. 261, where the ticket-seller seized the plaintiff, whom he suspected of passing a counterfeit coin for her ticket, the company was held responsible, in that here the servant acted for his master, and not the State. Delivering the opinion of the Court, GRAY, J., seems to say that, in the case of a carrier, the *scope of employment* of any servant is wider, when it comes to treatment of a passenger, than in any other case. The doctrine of these two cases seems utterly irreconcilable with either the English or the American rule.

In *McLeod* v. *R. R.* (*supra*) the plaintiff was taken from the train by the road's detective, on suspicion of theft, the conductor refusing to interfere. The court (VAN BRUNT, P. J., dissenting) holds the defendant liable, as the defendant's contract safely to carry the plaintiff to the agreed destination was violated. From *Goddard* v. *R. R. Co. supra*, the court quotes approvingly, and adds: "The rule relieving a master from liability for an injury caused by his servant, when not acting within the scope of his employment, does not apply, even though it be maliciously inflicted, as between a common carrier of passengers and a passenger." The same doctrine has been enunciated in the Fourth Department in *Wells* v. *N. Y. C. R. R.* (1898) 25 App. Div. 365. These decisions of the lower court are of weight. A further circumstance is that in New York the duty of the carrier to protect a passenger from misbehavior of fellow-passengers is recognized. *Putnam* v. *R. R. Co.* (1873) 55 N. Y. 108. *A fortiori* the duty to protect from the violence of its own employees should be enforced. *Goddard* v. *R. R. Co. supra.*

DUTY OF DEPOSITOR TO EXAMINE PASS-BOOK.—The loss arising from the payment of a forged or altered check must, as between the bank and the depositor, fall primarily upon the former, as, by a well-settled rule, it pays at its peril. The use of the pass-book and the practice of returning the vouchers to the depositor have, however, given rise to the question whether he may not be under some duty to examine these evidences of his account. The existence and extent of such a duty have been well defined by the Court of Appeals of New York in the recent case of *Critten* v. *Chemical National Bank* (1902) 171 N. Y. 219, which has completed the transformation of the New York law on this subject. In *Weisser* v. *Denison* (1854) 10 N. Y. 68, it had been held that the bank-book was merely an account stated, and that the neglect of the depositors to examine it would operate only to cast on him the burden of proving it to be